Supreme Court, U. S.
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No. 79-1424

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, for and on behalf of its affected members,

Petitioners,

VS.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, *et. al.,*

Respondents.

SUPPLEMENT TO PETITIONERS' RESPONSE TO OPPOSITION OF RESPONDENTS AND FEDERAL PARTIES

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Petitioners respectfully submit this Supplement to Petitioners' Response to Opposition of Respondents and Federal Parties to call to the Court's attention a decision of a Labor Department Administrative Law Judge in the matter of *OFCCP* v. *Firestone Tire & Rubber Company,* published in the BNA Daily Labor Report No. 109, June 4, 1980, at page D-1 (See Petitioners' Supplemental Appendix attached hereto, Pet.Supp. App. 1) which first came to Petitioners' attention on June 5, 1980 after the Response had been filed. In *OFCCP* v. *Firestone* (see Pet.Supp.App. 1), the OFCCP issued a complaint on

February 22, 1980, claiming that Firestone, a Government contractor, had violated Executive Order 11246 and the pertinent regulations thereunder in an Affirmative Action Program (AAP) for its Orange, Texas facility. The complaint alleged that the AAP was:

> ". . . deficient and unacceptable in the following respects:
>
> 1. It failed to declare underutilization of minorities and females in various job groups in accordance with Plaintiff's interpretation of the regulations at 41 CFR 60-2.11(b);
>
> 2. It failed to establish goals and timetables in accordance with Plaintiff's interpretations of the regulations at 41 CFR 60-2.10, and 60-2.12; . . ."
>
> (Pet.Supp.App. 1 & 2).

The complaint in *Firestone* ". . . seeks injunctive relief and imposition of the sanctions of cancellation of contracts and debarment pursuant to section 209(a)(5)(6) of the (Executive) Order" (Pet.Supp.App. 2). The complaint is predicated upon Firestone's failure to "voluntarily" declare in its AAP that it has underutilized minorities and women and has "failed to establish goals" consistent with Technical Guidance Memo No. 1, (Pet.App. A-87) which is an internal instruction to OFCCP personnel on how to administer 41 CFR 60 (Order #4) (rather than the alleged "good faith" requirements in 41 CFR 60 contended to be the applicable rules by which Government contractors are judged as alleged in the opposition of the federal parties).

The Technical Guidance Memo which, according to the *Firestone* decision, is being uniformly applied as the method of enforcing 41 CFR 60 was relied upon by Judge Zirpoli in the District Court decision below and was incorporated into, and is substantially similar to, the District Court's decree (Pet.App. A-70) which was affirmed by the Ninth Circuit in the *Legal Aid Society of Alameda County* v. *Brennan* and *Chamber of Commerce,* (Pet.App. A-1, *et seq.*) case now before the Court.

The issue in the *Firestone* case

> ". . . is whether, for purposes of establishing goals and timetables in an Affirmative Action Program, a Government contractor may determine if there is underutilization (i.e., having fewer minorities or women in a particular job group than would reasonably be expected by their availability) pursuant to 41 CFR § 60-2.11(b) by any method other than that provided in Technical Guidance Memo No. 1, which interprets underutilization as occurring whenever the percentage of minorities or women in a particular job group is less than their availability."
>
> (Pet. Supp. App. 3 & 4).

The *Firestone* case is called to the Court's attention at this eleventh hour because it demonstrates the continuing Government practice of strip construction of "underutilization" and goal setting requirements (quotas) contrary to the suggestion in the Petitioners' Response to Opposition of Respondents and Federal Parties that the "good faith" language of Order # 4, rather than the arguably impermissible requirements of the decree and Technical Guidance Memo are the operative regulations. The Administrative Law Judge in the *Firestone* case considers in his decision only whether the Guidance Memo has been promulgated consistent with federal regulations rather than the questions in issue in the instant petition.

The *Firestone* decision also acknowledges that the Guidance Memo

> ". . . is not only inconsistent with section 60-2.11(b), but . . . effects a substantive change in the rule and is legislative rather than interpretative in nature. It is clearly intended to be binding upon Government contractors."
>
> (Pet. Supp. App. 11).

The *Firestone* decision also demonstrates the OFCCP's current use of the decision of the Ninth Circuit in the instant case as claimed support for the continuing use of the Guidance Memo.[1]

[1] "The decision in *Legal Aid Society of Alameda County* (LASAC) v. *Brennan*, 608 F.2d 1319 (9th Cir. 1979), relied on by Plaintiff, is not to the contrary. The Court there approved the establishment of ultimate goals in an affirmative action program in an effort to achieve full utilization, but expressly refrained from deciding whether *Technical Guidance Memo No. 1* is a lawfully published rule having the force of law. Its dictum to the effect that, absent discrimination, utilization will not be less than availability does not resolve the question at hand as to what is "reasonably expected." (Pet. Supp. App. 11).

In conclusion, the *Firestone* decision demonstrates the continuing enforcement practices of the OFCCP by utilization of the Guidance Memo (embodied in the District Court's decree, affirmed by the Ninth Circuit) in contravention of the preferential hiring interdictions in Title VII of the Civil Rights Act of 1964 and the United States Constitution. The continuing practices of the Government affecting all contractors make the important questions presented in the Petition ripe for review at this time.

Respectfully submitted,

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June, 1980

SUPPLEMENTAL APPENDIX

6-4-80
DAILY LABOR REPORT (NO. 109) D-1

DECISION OF LABOR DEPARTMENT ADMINISTRATIVE LAW JUDGE IN MATTER OF OFCCP v. FIRESTONE TIRE & RUBBER COMPANY (TEXT)

IN THE MATTER OF UNITED STATES DEPARTMENT OF LABOR, OFFICE OF FEDERAl CONTRACT COMPLIANCE PROGRAMS,

Plaintiff,

vs.

FIRESTONE TIRE & RUBBER COMPANY, INC.,

Defendant.

Case No. 80-OFCCP-15

Before:
Robert J. Feldman
Administrative Law Judge

RECOMMENDED DECISION

This is a proceeding to enforce equal opportunity in employment by a Government contractor pursuant to Executive Order 11246, as amended by Executive Orders 11375 and 12086, and the rules and regulations promulgated thereunder.

Statement of the Case

On or about February 22, 1980, Plaintiff issued and served by mail upon the Defendant an administrative complaint alleging in substance that Defendant, a Government contractor, had violated Executive Order 11246 and pertinent regulations thereunder in that its revised 1978 Affirmative Action Program (AAP) for its facility at Orange, Texas was deficient and unacceptable in the following respects:

1. It failed to declare underutilization of minorities and females in various job groups in accordance with Plaintiff's interpretation of the regulations at 41 CFR 60-2.11(b);

2. It failed to establish goals and timetables in accordance with Plaintiff's interpretations of the regulations at 41 CFR 60-2.10 and 60-2.12; and

3. It failed to include adequate action-oriented programs to correct problem areas in job groups and organizational units as required by 41 CFR 60-2-13, 60-2.23 and 60-2.24.

By reason of these alleged delinquencies, Plaintiff seeks injunctive relief and imposition of the sanctions of cancellation of contracts and debarment pursuant to Section 209(a)(5)(6) of the Order. The complaint was amended as of course on or about March 4, 1980 (without change in the operative allegations), and an answer was duly filed on March 18, 1980, with a request for hearing.

In its answer Defendant admitted in effect that its revised 1978 AAP for its Orange facility did not declare underutilization in conformity with Plaintiff's interpretation of the pertinent regulations, but denied violating the Order or regulation, alleging that it had fully complied with all the requirements of the pertinent regulations with respect to underutilization. By way of affirmative defense, Defendant alleged that Plaintiff's interpretation was arbitrary and capricious and that it deprived Defendant of due process of law.

It should be noted that Defendant is not charged with discrimination against minorities or females. No discriminatory act or effect at Defendant's Orange facility has been alleged or proved. The proceeding deals solely with the sufficiency of the Affirmative Action Program adopted at that facility for 1978.

Since the issues in the case thus qualified for the newly adopted Expedited Hearing Procedures provided in 41 CFR § § 60-30.31-37, Plaintiff elected to bring the action thereunder. Accordingly, neither of the parties was allowed to avail itself of any pre-trial discovery, with the exception of requests for admissions and responses thereto, and with the further exception of Plaintiff's taking the depositions of certain expert witnesses pursuant to an order granted on motion with Defendant's consent. Since Section 60-30.32(d) requires that the hearing shall be convened within 45 days of receipt of the request for hearing and shall be completed within 15 days thereafter, the hearing was duly convened on May 2, 1980, and was completed on May 14, 1980. Mindful that Section 60-30.35 requires the Administrative Law Judge to recommend findings, conclusions and a decision within 15 days after the hearing is concluded, post-hearing briefs and proposed findings and conclusions were received on May 23, 1980, just six days ago. Thus, although no urgent need has been shown for summary disposition and no reason has been advanced for preferring this case over numerous prior proceedings in which divers minorities, females and handicapped persons may be awaiting corrective action for discrimination they have suffered, the ill-conceived and abortive time limitations of the Expedited Hearing Procedure have been scrupulously observed. As a result, and through no fault of the multiple counsel for the respective parties, we have a poorly prepared case, a record that is long on immaterial documents and short on cogent testimony, a diffuse presentation of fact and law, and in all candor, a hasty decision.

The Issue

Reduced to its simplest formulation, the principal issue in this case is whether, for purposes of establishing goals and timetables in an Affirmative Action Program, a Government contractor may determine if there is underutilization (i.e.,

having fewer minorities or women in a particular job group than would reasonably be expected by their availability) pursuant to 41 CFR § 60-2.11(b) by any method other than that provided in Technical Guidance Memo No. 1, which interprets underutilization as occurring whenever the percentage of minorities or women in a particular job group is less than their availability.

Plaintiff contends that its numerical disparity test is the sole and exclusive yardstick that may be used in the determination of underutilization, and that failure to comply with that interpretation is a violation of the regulation. Defendant contends that use of a five percent test of statistical significance in the determination of underutilization will reflect whether there are fewer minorities or women that would *reasonably be expected* by their availability, and that such use is therefore in compliance with the regulation.

Findings of Fact

1. Defendant Firestone Tire and Rubber Co. was at all relevant times, and still is, a federal contractor subject to the provisions of Executive Order 11246 as amended.

2. The Firestone Synthetic Rubber and Latex Co., a division of Defendant, owns and operates a facility in Orange, Texas that employed approximately 650 persons in 1977-78.

3. Since 1973 or earlier, Defendant has developed and maintained written Affirmative Action Programs for its Orange facility.

4. In February 1974, Plaintiff issued a policy directive entitled *Technical Guidance Memo No. 1,* interpreting underutilization as occurring whenever the percentage of minorities or women in a particular job group is less than their availability for that group.

5. Plaintiff interprets the regulations as requiring the contractor to set goals and timetables whenever utilization of either minorities or women is present in the job group, irrespective of the existence of any discrimination.

6. Since 1974, Plaintiff has interpreted the regulations regarding the establishment of goals for job groups to require ultimate percentage goals, which are expressed as a percentage rate of hiring, and if openings for the coming AAP year are projected, annually numerical goals.

7. It has been Plaintiff's policy since 1974 to require ultimate percentage goals equal to the availability rate established by the contractor whenever any underutilization exists.

8. Beginning in 1976, Plaintiff required annual goals only when underutilization represented one-half of a person or more. Since issuance of the Federal Contract Compliance Manual in October, 1979, annual goals are required only when underutilization represents one or more person.

9. Prior to October 1978, the Compliance Agency responsible for the Orange facility was the Department of Energy (DOE) and its predecessor agencies (ERDA and AEC).

10. In 1977, ERDA conducted an on-site compliance review of Defendant's Orange facility.

11. In the course of the on-site review and following discussions with the ERDA compliance officer, Defendant submitted three separate written Affirmative Action plans: the original plan for the period from April 1, 1977 to March 31, 1978; the first revised plan for the period from January 1, 1978 to December 31, 1978; and a second revised plan for the period from January 1, 1978 to December 31, 1978.

12. In its first revised plan and second revised plan, Defendant declared underutilization and set goals for those job groups in which minorities or females were underutilized at the five percent level of statistical significance.

13. Defendant's first revised plan and second revised plan contained a utilization analysis for all job groups, regardless, of the number of incumbents in each.

14. Defendant's original and first-revised plans did not include a utilization analysis and goals or timetables for organizational units, but its second revised plan included at the request of the ERDA compliance officer, a utilization analysis and goals and timetables for organizational units regardless of the number of incumbents.

15. Defendant's second revised plan contained an analysis of all ten items required to be considered in identifying possible problem areas by organizational unit in accordance with 41 CFR § 60-2.23(a), but identified none of the 19 items listed in subdivision (b) of that Section as requiring special corrective action.

16. In its first or second revised AAP, Defendant did not specify what action-oriented steps it would take to attempt to correct underutilization of a person or more which it had identified in job groups, or to attempt to implement the goals that had been established for job groups or organizational units, or to attempt to eliminate any underutilization in organizational units.

17. On May 15, 1978 (more than two months after Defendant had submitted its second revised AAP), Plaintiff's Director of OFCCP denied a request by Defendant for determination of substantial issues regarding the requirements of applicable regulations (41 CFR §§ 2.11(b) and 2.12), enclosing with his denial letter a copy of *Technical Guidance Memo No. 1*, as well as a copy of a 1974 letter to the Undersecretary of HEW stating that underutilization occurs whenever there is a numerical disparity between availability and utilization.

18. On August 15, 1978, Plaintiff issued a notice to show cause why enforcement proceedings should not be instituted for alleged deficiencies in the Affirmative Action Program for the Orange facility.

19. Among the Deficiency Findings attached to the notice to show cause was the statement that the second revised AAP does not acceptably identify minority or female underutilization as is required by 41 CFR 60-2.11(b), listing some examples of job groups where underutilization was not specifically identified and goals not established. The recommended corrective action was in pertinent part as follows:

> 1. Firestone should identify minority and female underutilization as is required by 41 CFR 60-2.11(b). The AACP must specifically state that underutilization exists for every job group where the percentage of the protected classes employed in that job group is less than the availability of them in such job group.
>
> This is accomplished by multiplying the number of incumbents in a job group by the percent of availability which was established by the required 8-factors analysis found in 41 CFR 60-2.11(b)(1) & (2).

20. None of the AAPs developed or maintained by Defendant for 1978 at its Orange facility declared underutilization in accordance with the above formula.

21. The five percent test of statistical significance is a common method of measuring probability, and is demonstrably close to reflecting normal expectancy according to the laws of chance.

22. From 1973 to 1979, Defendant employed a number of different methods for determining underutilization in AAPs developed at other facilities and such methods were approved by a number of compliance agencies, though such AAPs did not conform to the numerical disparity test above referred to.

23. Availability rates are compiled from a number of sources, some of which may be incomplete or out of date, and are often the product of negotiation, with the result that they might be considered statistically variable and imprecise.

24. Major job groups are considered by Plaintiff to be those that contain more than 50 persons.

25. The original AAP for 1977-78 contained 21 job groups, 17 of which contained less than 50 persons.

26. Plaintiff's interpretation of 41 CFR § 60-2.11(b), as embodied in *Technical Guidance Memo No. 1* or otherwise, has never been published for notice and comment.

Conclusions of Law

Section 202 of Executive Order 11246 provides that every Government contract shall include among other things the following provision:

> "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin."

Section 201 of the Order empowers the Secretary of Labor to adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes of the parts of the Order he administers.

The above sections comprise the underlying authority for the Secretary's promulgation of the regulations contained in 41 CFR Part 60-2 entitled "Affirmative Action Programs," and otherwise known as "Revised Order No. 4."

Having duly issued and published Section 60-2.11(b) of such regulations, in which "underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability, may an administrator bind contractors to an interpretation of such regulation if it materially limits or alters the operative effect of the rule?

First, it should be pointed out that adjudication of this controversy does not require a determination of the comparative merits of the methods employed by the respective parties to determine underutilization. I have no doubt that the numerical disparity test advocated by the Director of OFCCP has many attributes, including simplicity, fairness and uniformity; to say nothing of its obvious effectiveness in increasing the likelihood of affirmative action to obtain equal employment opportunity. It may be a good method, perhaps even the best method, of finding the number of minorities or women that would reasonably be expected in a job group having a given availability. *The question is* whether, by reason of its adoption as the guideline for enforcement by compliance officers, it is the only method of obtaining such a reasonable expectation cognizable under Section 60-2.11(b).

It is well also to eliminate from consideration the suggestion that since it may result in race-conscious or gender-conscious employment or promotion, it runs counter to the purpose of the Order. The simple fact is that the objective of equal employment opportunity cannot be attained by affirmative action programs or otherwise without some dislocation of the status quo and without some adverse effect on those who are outside the protected class (i.e., white males). Consequently, reasonable measures to reach equal employment opportunity which may be prejudicial to others have been upheld. See *United Steel Workers, etc.* v. *Weber,* ____ *U.S.* ____ *99 S.Ct. 2721 (1979); United States* v. *City of Miami,* ____ F.2d ____, No. 77-1856, 5th Cir. April 10, 1980 (85 BNA Daily Labor Report 4-30-80, D-1).

Since the Administrative Procedure Act [5 U.S.C. § 553(b) and (d)] excepts interpretive rules and general statements of policy from the general requirement of notice and comments, we must consider the substance and effect of *Technical Guidance Memo No. 1* rather than its characterization

as an "interpretation" of Section 60-2.11(b) of the regulations. Concededly, *Technical Guidance Memo No. 1* does not purport to be a rule or regulation; it is an internal memorandum from the Director of OFCCP to all contract compliance officers its subject being: *"Technical Guidance Memo No. 1 on Revised Order No. 4."* Its stated purpose is to give specific guidance on the proper interpretation on certain selected issues that have been or continue to be raised regarding Revised Order 4. It provides *inter alia* as follows:

> (4) Underutilization Analysis. Whenever the percentage in a job or group of jobs of total minorities, or any minority group exceeding 2% or more of the labor area, or of women is lower than the percentage of such persons available in that job category within the applicable labor area, the affirmative action program must specifically state that underutilization exists in that category.

Though labelled as "interpretative," the memorandum does not explicate, amplify or clarify what "would reasonably be expected" as a determinant for underutilization pursuant to Section 60-2.11(b) of the regulation. Rather, it substitutes for the flexible concept of reasonable expectation in the light of availabilities a compulsory mathematical formula for calculating underutilization. It is much like interpreting a provision that an act be performed within a reasonable time to mean that such an act must be performed within 10 days under any and all circumstances. Instead of providing guidance as to what may be regarded as reasonably expected, the memorandum establishes a single immutable standard of reasonableness, carrying with it the corollary that any other standard is necessarily unreasonable. In my view, that does not interpret the regulation; it amends the regulation.

As a general rule, an administrative agency's interpretation of its own rules is usually followed unless it is plainly erroneous or inconsistent with the regulation. See *Udall* v. *Tallman,* 380 U.S. 1, 85 S. Ct. 792 (1965); *Bowles* v. *Seminole Rock and*

Sand co., 325 U.S. 410, 65 S. Ct. 1215 (1945); *2 K. Davis, Administrative Law Treatise,* § 7:22 (2d ed. 1979). *Technical Guidance Memo No. 1,* however, is not only inconsistent with Section 60-2.11(b), but as demonstrated above, it effects a substantive change in the rule and is legislative rather than interpretive in nature. It is clearly intended to be binding upon Government contractors. Consequently, it is not exempt from the requirement of notice and comments under the Administrative Procedure Act (5 USC § 553). Moreover, I conclude from the evidence that it has substantial impact upon the affirmative action programs required of all Government contractors and that elementary fairness dictates that a reasonable opportunity be given for submission of views by those materially affected. Since notice and comment procedure was not followed, the mandate of *Technical Guidance Memorandum No. 1* does not have the force of law nor the authority of a duly promulgated administrative regulation. See *Independent Broker-Dealer's Trade Ass'n.* v. *SEC,* 442 F.2d 132, 144 (D.C. Cir. 1971), cert. denied 404 U.S. 828 (1971); *Cerro Metal Products* v. *Marshall,* Nos. 79-1760-1763 (3rd Cir. April 24, 1980); *Marshall* v. *Western Union Telegraph Co.,* No. 79-1695, 3rd Cir. May 5, 1980 (95 BNA Daily Labor Report 5-14-80, D-1); *Pharmaceutical Manufacturers Ass'n* v. *Finch,* 307 E. Supp. 858 (D-Del. 1970).

The decision in *Legal Aid Society of Alameda County (LASAC)* v. *Brennan,* 608 F.2d 1319 (9th Cir. 1979), relied on by Plaintiff, is not to the contrary. The Court there approved the establishment of ultimate goals in an affirmative action program in an effort to achieve full utilization, but expressly refrained from deciding whether *Technical Guidance Memo No. 1* is a lawfully published rule having the force of law. Its dictum to the effect that absent discrimination, utilization will not be less than availability does not resolve the question at hand as to what is "reasonably expected".

Since it has not been shown that Section 60-2.11(b) mandates the exclusive use of numerical disparity to determine underutilization, Plaintiff has proved merely that Defendant's 1978 AAPs for its Orange facility are in violation of *Technical Guidance Memo No. 1.* With respect to Defendant's failure to declare under-utilization in certain job groups, Plaintiff has failed to sustain its burden of proving any violation of the Executive Order or of the regulations promulgated thereunder.

This case has been posited upon Defendant's failure to determine underutilization in accordance with the formula adopted by Plaintiff. Whether Defendant's AAPs otherwise comply with the provisions of Section 60-2.11(b) has not been fully developed. Therefore I make no findings and reach no conclusion with respect to the reasonableness or validity of Defendant's declarations as to underutilization in any job group. I do conclude, however, that Defendant has not sustained its burden of proving that Plaintiff's interpretation was arbitrary and capricious or that Defendant has been denied due process of law.

There is neither opportunity nor necessity to discuss other aspects of the record, for there can be little doubt that any other deficiencies in the AAPs in question, even if proved, would not warrant the injunctive relief and/or the imposition of the drastic sanctions sought in this proceeding.

RECOMMENDATION

In view of all of the foregoing, I respectfully recommend that the administrative complaint herein be dismissed without prejudice to renewal upon other grounds.

/s/ ROBERT J. FELDMAN
Administrative Law Judge

Dated: May 29, 1980
Washington, D.C.